STATE OF WISCONSIN
SUPREME COURT

MILTON J. CHRISTENSEN, ALISA JAMIESON, ERIKA HENDERSON, WILLIAM NOGGLE, TROY BRIGGS, AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

MICHAEL J. SULLIVAN, ROBERT KLIESMET, and LEV BALDWIN,

Defendants,

MILWAUKEE COUNTY and DAVID A. CLARKE, JR., MILWAUKEE COUNTY SHERIFF,

Defendants-Respondents-Petitioners.

Appeal No. 2006AP000803

On Review of a Decision of the Court of Appeals, District I, Dated January 29, 2008

BRIEF OF PETITIONERS

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1. Under *Frisch v. Henrichs*, 2007 WI 102, 304 Wis. 2d 1, 736 N.W.2d 85, does Chapter 785 of the Wisconsin Statutes allow for an award of damages as a remedial sanction where the contemptuous conduct has ceased and traditional avenues of relief are still available to the allegedly aggrieved party?

The Court of Appeals answered "Yes."

2. Should the decision in *Frisch* be applied retroactively to the facts of this case when the conduct at issue ceased and the Circuit Court issued its ruling before *Frisch* was decided?

The Court of Appeals answered "Yes."

3. If the Court of Appeals correctly applied *Frisch*, should the holding of *Frisch* be reexamined?

The Court of Appeals did not answer this question, as only this Court has the power to reexamine its holding in *Frisch*.

4. If the Court of Appeals correctly applied *Frisch*, did it nonetheless improperly usurp the role of the Circuit Court by mandating that it award damages to 16,662 former prisoners of the Milwaukee County Jail, thereby eliminating any discretion on the part of the Circuit Court to determine the proper remedial sanction?

The Court of Appeals did not answer this question, as it arises only because of the manner in which the Court of Appeals remanded this case to the Circuit Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Petitioners, Milwaukee County and Milwaukee County Sheriff David A. Clarke, Jr. (collectively, "Milwaukee County" or "the County"), respectfully request the opportunity to present their position at oral argument. Oral argument will assist this Court by allowing the parties to more fully present the theories and legal authorities developed in their respective briefs and because of the significance of the statutory and public policy issues raised by this case.

The County respectfully submits that the decision in this case should be published. Specifically, the decision in this case is likely to substantially clarify the law in Wisconsin regarding the imposition of remedial sanctions for contempt and resolve a matter of substantial and continuing interest to the public.

STATEMENT OF THE CASE

In Wisconsin, remedial contempt sanctions are limited to those imposed for the purpose of terminating a "continuing" contempt of court. Wis. Stat. §§ 785.01(3) & 785.04(1). Accordingly, in the past, the Wisconsin courts have consistently held that contemptuous conduct must be ongoing to permit an award of remedial sanctions. *See, e.g., State v. King*, 82 Wis. 2d 124, 130, 262 N.W.2d 80 (1978); *Evans v. Luebke*, 2003 WI App 207, ¶ 22, 267 Wis. 2d 596, 671 N.W.2d 304; *Benn v. Benn*, 230 Wis. 2d 301, 309, 602 N.W.2d 65 (Ct. App. 1999).

More recently, in *Frisch v. Henrichs*, 2007 WI 102, 304 Wis. 2d 1, 736 N.W.2d 85, a four justice majority of this Court moved beyond the

clear words of the statute and the traditional reading of a trial court's remedial contempt powers in considering what constitutes a continuing contempt. However, the *Frisch* majority did so in the context of a family court proceeding where the contempt had deprived the victim of any traditional avenues of recourse and where a compelling argument was made that the underlying conduct was, in fact, still continuing.

In this case, the decision of the Court of Appeals represents a wholesale departure from any traditional understanding of a trial court's remedial contempt powers under Chapter 785 and imposes an incorrect rule regarding continuing contempt. Indeed, it is undisputed that the conduct underlying the Circuit Court's finding of contempt – the holding of lawfully incarcerated prisoners in the booking room of the Milwaukee County Jail in excess of thirty hours before assigning them to a housing area elsewhere in the Jail in violation of a 2001 consent decree – ceased months before plaintiffs' initial contempt motion was filed. Further, the conduct at issue did not deprive plaintiffs of a traditional remedy for any harm they allegedly suffered. Nonetheless, according to the Court of Appeals, the contempt was continuing under *Frisch* simply because any harm suffered by individual members of the plaintiff class was "unremedied." Based on this holding, the Court of Appeals remanded to the Circuit Court with directions that it conduct further proceedings to determine the amount of the monetary sanction to be imposed against the County in favor of the plaintiff prisoners.

If the Court of Appeals' decision is allowed to stand, any act of contempt will now necessarily be continuing and subject to remedial sanctions – even if the underlying conduct itself has stopped – unless and until the persons allegedly harmed by the conduct have been compensated. Such a result is in direct conflict with the statutory language, is inconsistent with prior decisions of this Court regarding remedial contempt sanctions, and was not intended by the majority's holding in *Frisch.*

Moreover, the Court of Appeals' decision usurps the Circuit Court's discretion by mandating that it award damages as a remedial sanction rather than directing it to consider damages as one possible sanction under the statute. In doing so, the decision takes a judicial decree that arose from a case filed more than twelve years ago seeking only injunctive relief – a decree that purposefully did not contemplate compensatory damages for a violation of its provisions – and gives it new life more than five years after it was first eligible to be terminated as a means of awarding money damages to members of the plaintiff class of prisoners. This result is seemingly unprecedented in prisoner class action litigation nationwide, is contrary to recent trends in such litigation, and ignores the procedural complexities that would confront the Circuit Court in determining how to award potentially drastic money damages to 16,662 one-time prisoners of the Milwaukee County Jail.

I. THE NATURE OF THE CASE, ITS PROCEDURAL HISTORY, AND THE DISPOSITIONS BELOW.

The plaintiff class filed this lawsuit in 1996 seeking declaratory and injunctive relief concerning conditions that then existed in the Jail. (R.12.) The Circuit Court certified a plaintiff class for declaratory and injunctive relief. The class included all prisoners in the Jail, both then and in the future. (R.27.) Neither the complaint nor the class certification order contemplated an award of compensatory damages. (R.12 & 27.)

On June 19, 2001, the Circuit Court approved a negotiated settlement agreement and consent decree (the "Consent Decree") initially resolving the litigation. (R.161; App. 35-84.)

On September 13, 2004, the plaintiff class filed a motion seeking an order finding the County in contempt and in breach of the Consent Decree and asking for compensatory damages. (R.240.) After discovery, the plaintiff class renewed its motion on July 29, 2005. (R.254.)

On January 4, 2006, the Circuit Court issued a Decision and Order denying plaintiffs' motion. (R.282; App. 21-34.) The Circuit Court concluded that Milwaukee County had acted in contempt by allowing 16,662 prisoners to remain in the Jail's booking area in excess of 30 hours. (R.282 at 8; App. 28.) However, considering the request of the plaintiff class for an award of damages as a remedial contempt sanction, the Circuit Court concluded that no such remedy was available because the conduct underlying the contempt finding had ceased. (*Id.*)

On January 29, 2008, the Court of Appeals issued a published Decision reversing the Circuit Court. (App. 1-19.) Relying on *Frisch* – and notwithstanding the fact that any violations of the Consent Decree stopped four months before the plaintiff class filed its initial motion for relief – the Court of Appeals concluded that the remedial sanctions set forth in Wis. Stat. § 785.04(1) are available to plaintiffs because the contempt found by the Circuit Court was "continuing." (App. 4 & 19.) According to the Court of Appeals, the contempt was (and is) continuing because the prisoners held in the Jail's booking area in excess of 30-hours "have suffered unremedied injury as a direct result of that noncompliance" with the Consent Decree. (*Id.* 19.)

Rather than remanding to the Circuit Court for a determination in its discretion of the proper remedial sanction, if any, the Court of Appeals remanded with specific directions that the trial court "determine . . . the 'sum of money sufficient to compensate' the prisoners held in violation of the Consent Decree for the 'loss or injury suffered.'" The Court of Appeals gave no guidance to the Circuit Court on what procedure it was to follow in locating and awarding such damages to each of the 16,662 prisoners in question. (App. 19.)[1]

[1] The Circuit Court also denied a request by plaintiffs for damages under a breach of contract theory. (R.202 at 1 & 9-14; App. 21 & 29-34.) The Court of Appeals did not reach plaintiffs' breach of contract theory. (App. 19.)

STATEMENT OF FACTS.

At the outset of this litigation in 1996, plaintiffs asserted that conditions in the Jail were deficient under the Wisconsin Constitution. According to plaintiffs, these conditions included, among other things, serious overcrowding, routine double-celling of inmates, a lack of personal safety and outbreaks of violence, the absence of proper inmate classification, and a substantial lack of access to medical, dental, and psychiatric staff and care. (R.12.) The Consent Decree that initially resolved this lawsuit is a complex, forty-eight page document containing myriad provisions relating to population control measures and the medical, dental, and psychiatric care of inmates in the Jail. (R.262, Ex. A; App. 35-84.)[2] And, despite the problems experienced before May 2004 under a

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[2] While at one time consent decrees were perceived to be an efficient mechanism to address prison conditions, that perception more recently has been changing. Legislators, prison officials, and taxpayers have come to bemoan micromanagement of jails by the courts, the burden on the taxpayers of seemingly never-ending lawsuits, and perpetual consent decrees that take on a life of their own. Indeed, in 1996 President Clinton signed into law the Prison Litigation Reform Act of 1995 (the "PLRA"), Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321-66 to 1321-77 (1996) (codified in sections of 18 U.S.C., 28 U.S.C., & 42 U.S.C.). One of the stated reasons behind the passage of the PLRA was to curtail the micromanagement by the federal courts in running state and local jails:

> [N]o longer will prison administration be turned over to Federal judges for the indefinite future for the slightest reason. Instead, the States [or the appropriate federal agency] will be able to run prisons as they see fit unless there is a constitutional violation, in which case a narrowly tailored order to correct the violation may be entered.

141 Cong. Rec. S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham). As a sponsor of the legislation stated: "[t]he legislation I am introducing today will return sanity and State control to our prison systems. It will do so by limiting judicial remedies in prison cases . . . ." 141 Cong. Rec. S14316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham).

single provision of the Consent Decree – the so-called "30-Hour Rule" – the overall record since the entry of the Consent Decree is one of undisputed success by the County in correcting the problems originally alleged by plaintiffs and creating a first-class jail.[3]

A. The Consent Decree.

1. Population Control.

Part I of the Consent Decree, relating to "Population Limits," contains several restrictions on the population of the Jail: (1) the County must maintain the total population of the Jail below 1,100 as measured at the daily 11:59 p.m. prisoner count;[4] (2) the County must use its "best efforts" to ensure that the population of the Booking/Open Waiting area of the Jail (the "BKOW") is less than 110 as of the 11:59 p.m. count; and (3) no prisoner may be held in the BKOW for longer than 30 hours (the "30-Hour Rule"). (R.262, Ex. A at 4-5; App. 38-39.) Nothing in national standards, state statutes, or state administrative regulations independently sets a standard comparable to the 30-Hour Rule. (R.269 ¶¶ 11 & 13; R.265 ¶ 18.)

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[3] Creating a first-class jail has not come without a price. The record reflects that, between 2001 and 2003, the daily cost to house an inmate at the CJF increased 31.6% and that the CJF's expenditures as a percentage of the County's tax levy has risen from 18.19% to 23.27%. (R.271.)

[4] By stipulation of the parties, the total population cap was lowered to 960 for remaining life of Part I effective May 14, 2007. (R.322.) Both the 1,100 and 960 caps reflect a substantial reduction from the population figures in the Jail prior to the Consent Decree. (*See generally* R.12.)

2. Substantial Compliance (Which Is Not Measured By The 30-Hour Rule).

The Consent Decree's population provisions originally were to remain in place for a minimum of two years and, in any event, until the Circuit Court determines that the County is in "substantial compliance" with the Decree and that "there is no longer a need for the court's involvement to prevent future overcrowding." (R.262, Ex. A at 5-6; App. 39-40.) Under the negotiated terms of the Consent Decree, substantial compliance is measured by three specific factors, none of which relates to the 30-Hour Rule. (R.262, Ex. A at 5; App. 39.)

3. Monitoring.

The County is required to regularly mail to counsel for the plaintiff class several reports regarding the population of the Jail. (R.262, Ex. A at 6; App. 40.) Further, counsel for plaintiffs have the right to conduct inspections of the Jail and to have access to county staff under the Decree. (R.262, Ex. A at 6-7; App. 40-41.) The County has satisfied these monitoring obligations since the entry of the Consent Decree. (R.262 ¶ 10 & Ex. I.)[5]

4. Remedies For Non-Compliance (Which Do Not Include Damages).

The Consent Decree does not authorize compensatory damages for violations of its terms. (R.262, Ex. A at 6; App. 40.) Counsel for the

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[5] Counsel for the plaintiff class was required to prepare semi-annual reports to the Circuit Court indicating the status of the County's compliance with the Consent Decree's population provisions, including the 30-Hour Rule, but never did so. (R.262, Ex. A at 6-7; App. 40-41; R.262 ¶ 13.)

plaintiff class expressly acknowledged this fact when advocating for judicial approval of the Decree. (R.302 at 4 & 10; R.303 at 6.) For example, during one settlement hearing, then counsel for the plaintiff class stated:

> [a]s the Court knows, this is a class action, and members of the class are all inmates who are now or in the future will be subject to policies and procedures of the defendants. The relief, as the Court knows, is injunctive relief, so that it applies to all members of the class. *There are no damages, individual damages sought in this case.*

(R.303 at 6 (emphasis added).)

B. The Booking/Open Waiting Area.

1. Plaintiffs' Allegations Regarding Conditions In The Booking Room.

The Circuit Court noted that various members of the plaintiff class alleged conditions in the BKOW that were "unacceptable, if not appalling," and the Court of Appeals quoted at length from the Circuit Court's decision on this issue. (App. 27 & 7-8.) The County has never conceded that the conditions in the BKOW fell below acceptable standards for a major metropolitan jail facility. (R.308 at 22-25.) Indeed, as is described below, the evidence submitted by the County directly disputed many of the claims made by the plaintiff class concerning conditions in the BKOW.

However the precise nature of the conditions in the BKOW (beyond the fact that prisoners were held there longer than permitted by the 30-Hour Rule) was and is not relevant to the issue of whether plaintiffs are entitled, as a matter of law, to recover compensatory damages for any contempt on the part of the County. Thus, while the following description of certain

aspects of the BKOW provides basic context for the issues before this Court given plaintiffs' allegations, the full nature of the conditions in the BKOW can only be definitively litigated should this case ultimately return to the Circuit Court for further proceedings on the question of damages.

2. The Layout And Basic Amenities In Booking.

The BKOW is where prisoners entering the Jail are processed and held before they are assigned to space in one of the facility's permanent housing areas or released altogether. (R.267 ¶ 3.) The only persons held in the BKOW are those who are lawfully incarcerated, and there has been no allegation by plaintiffs to the contrary.

The BKOW contains a large open waiting area surrounded by seventeen separate cells, each of which can lawfully accommodate between seven and twelve prisoners. The open waiting area contains several rows of benches on which prisoners are permitted to sit. Consistent with state regulations, the benches for females are separated from those for males. (*Id.* ¶ 4.)

The BKOW is climate controlled, with both heat and air conditioning, and the temperature in the BKOW is consistently maintained at roughly seventy-two degrees Fahrenheit. (*Id.* ¶ 5.) Prisoners being held in the BKOW have appropriate access to food (including fruit for inmates with special dietary needs), drink, restrooms, phones, and televisions. (*Id.* ¶¶ 4-9; R. 265 ¶ 13.) It is undisputed that the food offered prisoners in the BKOW is consistent with food offered in booking rooms in other jails across the country. (R.265 ¶ 13.)

3. Staffing And Security Measures.

The Sheriff's Office uses a "direct supervision" model in the BKOW, with some staff stationed at an elevated booking desk and others on foot in and among the prisoners. At any given time, between five and nine officers and a sergeant are stationed in the BKOW monitoring the inmates. (R.267 ¶ 10.)

Inmates entering the Jail are searched by the agency transferring custody to the Sheriff's Office and then again by Sheriff's personnel. (*Id.* ¶ 13.) Prisoners' movements are readily observable by Jail personnel at all times. (*Id.* ¶ 15.) Further, the cells surrounding the open waiting area of the BKOW contain an alarm system so that Jail personnel are alerted in the event of an emergency. (*Id.* ¶ 16.)

4. Medical Care.

Upon admission to the Jail, each prisoner has an initial medical screening with a registered nurse. If appropriate, the prisoner is directed to a hospital for medical care. (R.267 ¶¶ 18 & 20; R.266 ¶¶ 10 & 12.)

Prisoners have access to medical care during the entire time they are in the BKOW. A registered nurse is assigned to the BKOW and is on duty at all times. A psychiatric social worker is available in the BKOW sixteen hours a day, six days a week. Both a physician and a psychiatrist are present at the Jail on a full-time basis, and a physician and a psychiatrist are also on call during non-business hours. (R.267 ¶ 19; R.266 ¶ 11.)

In the BKOW, a nurse conducts a wellness round every four hours. Every two hours, a nurse conducts separate rounds to ensure that prisoners'

hypertension needs are met. In addition, medication rounds occur four times daily. Since medical personnel are always available, the BKOW has an "open sick call." Prisoners needing nursing evaluations more than two times a shift are moved to a special housing unit. (R.267 ¶ 20; R.266 ¶ 12.)[6]

C. The County's Efforts To Comply With The Decree And The Unanticipated Problems Under The 30-Hour Rule.

In the almost seven years since the Consent Decree was entered, the County has successfully complied with all but one of its multiple population control provisions. As is now clear, between November 2001 and April 2004, the County did not ensure that each of the roughly 128,000 prisoners booked into the Jail (all of whom who were properly in the Jail) were moved from the BKOW to housing areas fast enough to comply with the 30-Hour Rule. These violations occurred despite the best efforts of the County to comply with the Decree as a whole.

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[6] Some of the prisoner affidavits offered by plaintiffs before the Circuit Court raised issues with respect to the medical care prisoners received in the booking room. (*See* R.256 at Keuffer, Roche, Collins, Evans, Gunnarson, Hyke, Payton, & Ziesmer Affidavits.) For instance, Anthony Hyke, who according to public records available on the Wisconsin Circuit Court Access website, was being held in the Jail in April 2003 on felony charges of sexual assault and enticement of a child and was later convicted of felony child enticement-sexual contact, asserts that he did not receive a prescription medication for acid reflux while he was in the booking room. (*See* http://wcca.wicourts.gov (Milw. Co. Case 2003CF2524); R. 256, Hyke Affidavit.) However, as the affidavit offered by the County from the Jail's Medical Director illustrated, many of the allegations in these affidavits were incomplete, misleading and, in some respects, simply false. (R.273.) These factual issues need to be resolved at the Circuit Court level only if the plaintiff class is entitled to compensatory damages under Chapter 785.

1. The County's Focus On The Population Caps.

Following the entry of the Consent Decree, the County and the Sheriff made compliance with the population control provisions a high priority. First and foremost, the Sheriff made every effort to keep the total population of the Jail below 1,100 (and, since May 2004, below 960). By keeping the facility population within the cap set by the Consent Decree, the Sheriff's Office intended to maintain its ability to move inmates through the BKOW in greater numbers and at a quicker pace so as to stay in compliance with the BKOW population cap and the 30-Hour Rule. (R.262, Ex. H at 26-27.)

As Deputy Inspector Jerianne Feiten, who was assigned to run the Jail between late 2002 and early 2004, testified:

> Orally or in writing, everyday it was reinforced that we would do – make every feasible attempt possible to reduce facility population. By reducing facility population, that would open up beds upstairs to which those beds would be filled from the booking room. So that would be a cycle that would be going on and looked at on a constant basis on all three shifts. So in that way we were looking to move people out of booking as quickly as possible.
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> . . .
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> If I don't have any beds available, I don't have any way to move anyone out of booking. So at the time I was assigned to the jail, population was always extremely high. Focus on booking came via reducing population in any way possible, because then we could move people from booking upstairs.

(*Id.*) As Deputy Inspector Feiten further testified:

> So I worked endlessly at figuring out ways to either reduce the population or to prevent taking in any more inmates. So therefore, it would be a trickle down effect. I could move people out of booking. I could move them

> out faster, and if I did that trickle down effect they would be in the booking room less than 30 hours.

(*Id.* at 102.)

2. Outside Pressures And Limitations On The County's Compliance With The Decree.

However, the County's ability to comply with the population control provisions of the Consent Decree, including the overall population cap and the 30-Hour Rule, has always been significantly impacted by pressures and limitations that are outside its control. In fact, the County has no control over the number of prisoners arrested and brought to the Jail by the municipalities it serves, including the City of Milwaukee. (R.267 ¶ 21.) Moreover, in the past, the County had only limited control over the number of state prisoners the Jail was required to accept on probation or parole violation holds (so-called "VOPs"). (*Id.* ¶ 22.) Likewise, the County has no control over the rate at which prisoners are processed through the criminal justice system and, ultimately, cleared for release or transfer. (*Id.* ¶ 23.)

Nonetheless, following the entry of the Consent Decree, the County successfully kept the total population of the Jail below the caps imposed by the Decree. To do so, the County relied, among other things, on contacts with the Milwaukee County House of Correction ("HOC") to open additional dorms to house prisoners from the Jail, contacts with court representatives to secure lowered bail amounts and earlier releases, contacts with the Department of Corrections to slow or stop the influx of VOPs, and attempts to stop or at least control the flow of prisoners coming into the Jail

from other local law enforcement agencies. (R.262, Ex. H at 26-27, 31-33, 62, 68, 72, & 102.)

3. The Jail's Objective Classification System.

To avoid assignments that will cause safety and security risks, the Jail uses a classification system to assign prisoners to various housing areas based on a series of objective factors (such as age, sex, criminal history, pending or sentenced charge, escape history, institutional disciplinary history, alcohol or drug abuse history, and various stability factors). (R.267 ¶ 24.) This objective classification system is an accepted modern-day corrections practice.

However, with this objective classification system in place, the Jail is never able to assign prisoners to each of the 990 beds in the facility, as it never has the perfect mix of prisoners. For instance, males and females do not enter the system in perfect 64-person groups, so the male and female housing units can rarely be filled to the maximum. Likewise, the Jail can never count on a full complement of sick or injured prisoners for the infirmary, prisoners with disciplinary problems for Pod 4D, or prisoners with mental health problems for the special needs unit. As a result, even when the total population of the Jail was below 1,100, the Jail staff still was not able to move prisoners out of the BKOW to fill all 990 beds in the facility. (*Id.* ¶ 25; R.262, Ex. H at 69-71.)

In this fashion, the original total population cap of 1,100 set by the Decree, when it was implemented in the context of the Jail's objective classification system, allowed for a situation where the County was not

always able to comply with the 30-Hour Rule even when it met its obligation to keep the total population of the Jail under the cap.

4. The Resulting Problems Under The 30-Hour Rule.

Ultimately, the officials running the Jail were so focused on keeping the overall population of the Jail below the 1,100 figure that they did not ensure that each prisoner stayed in the BKOW for fewer than thirty hours. (R.262, Ex. H at 49 & 68.) Roughly 111,400 (or 87% of the approximately 128,000 prisoners booked between November 2001 and April 2004) were timely processed through the BKOW, and roughly 16,600 (or 13% of the total) were not. (App. 23-24; R.267 ¶ 30.) However, while the Circuit Court concluded that the conduct of the County was intentional as a matter of law, there is no evidence in the record suggesting that the Jail's command staff actually had knowledge that the number of 30-Hour violations was as high as is now known. As Deputy Inspector Feiten explained in her testimony:

> Again, all of my concentration was on reducing facility population so that therefore I could move people out of booking. Yes, I was aware at times people were in booking for extended periods of time. But as far as trying to generalize it and say it was routine – I was more concerned with dealing with facility population, which in turn trickles down to booking room population.
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> . . .
>
> I'm just surprised. We struggled with the population language you have in that settlement everyday, and on most days we were in total compliance. And if I was in compliance there, I would maybe erroneously assumed I was in compliance in other places. But again, I concentrated on total facility population, because if I wasn't within those guidelines it's a domino effect.

(R.262, Ex. H at 49 & 68.)

Further, when counsel for the plaintiff class first asked questions in mid- to late-2003 about information regarding the length of time prisoners were spending in the BKOW, the County mistakenly relied on computer-generated data reflecting the average time spent in BKOW rather than the underlying raw information. This data regarding average stays in BKOW suggested that the County was well within the parameters of the Consent Decree in this respect and did not reveal the nature or extent of the problem. (*Id.*, Ex. K at 69-70 & 135-38.) Only later, when the data that was provided to the Circuit Court in April 2004 was specially generated, was the full extent of the problem known. (*Id.*, Ex. H at 49 & 68; *Id.*, Ex. K at 70-75.)

5. The Problems Under The 30-Hour Rule Did Not Lead To An Increase In Serious Disciplinary Incidents Or Other Problems In The Eyes Of The State Jail Inspector.

Importantly, it is undisputed that the fact that numerous prisoners remained too long in the BKOW did not lead to an increase in serious disciplinary incidents. In fact, according to Dr. Stan Stojkovic, Dean of the School of Social Welfare at the University of Wisconsin-Milwaukee, and Dr. Rick Lovell, Chair of UWM's Department of Criminal Justice, the number of prisoners transferred from the BKOW to the Jail's Pod 4D (used for disciplinary problems), both before and after the Sheriff fixed the 30-Hour problem in April 2004, was extremely low when compared to the total number of persons booked into the Jail. Moreover, there was no substantive difference in the numbers of prisoners transferred to Pod 4D

before the April 2004 solution versus the numbers similarly transferred after April 2004. (R.264.)

In addition, Walt Morzy, a Detention Facilities Specialist with the Department of Corrections, never observed an overcrowding problem in the BKOW during his numerous, at times unannounced, inspections in the period between November 2001 and April 2004. (R.264; R.269.) In fact, Morzy believes that since the entry of the Consent Decree, the Jail has made tremendous strides, particularly in providing health services to inmates. (R.269 ¶¶ 11 & 13.)[7] Further, the County's expert jail consultant also confirmed that the BKOW posed no substantial risk of harm to prisoners and was superior to others he has toured. (R.265.)

D. The Solution Implemented By The County In April 2004.

When the County realized in April 2004 that a significant number of prisoners had been held in the BKOW for longer than thirty hours, it immediately corrected the problem. It did so by unilaterally instituting a self-imposed total population cap of 960 at the Jail and by freeing additional funding to use dorms at the HOC as overflow space. (R.262, Ex. K at 148-49 & 155; R.267 ¶¶ 26-27.)

This self-imposed cap went beyond the provisions of the Consent Decree, and it corrected the disconnect described above between the

[7] Overall, the County also has successfully complied with its obligations under the lengthy portions of the Consent Decree relating to the provision of health care in the Jail. (*See* R.262, Ex. A at Part II.) This was confirmed by the testimony of Dr. Ronald Shansky, a nationally-renowned expert in correctional medicine who was appointed as the Medical Monitor under the Decree after having served as the expert for the plaintiff class. (*Id.*, Ex. J at 11-18, 21, 48, & 57.)

population control measures and the objective classification system of the Jail. By following this self-imposed cap of 960 beginning in May 2004, the Sheriff has been able to guarantee the flexibility to house prisoners in the Jail using the objective classification system and still avoid the backlog of prisoners in the BKOW awaiting assignment to a permanent housing area that led to the 30-hour problems experienced between November 2001 and April 2004. (R. 267 ¶ 27.)

In addition, the Jail now monitors daily how long each prisoner in the BKOW has been there in an effort to prevent any future reoccurrence of problems under the 30-Hour Rule. (*Id.* ¶ 28.)

E. Current Compliance By The County.

Since 2001, the County has successfully maintained the overall population of the Jail within the caps set by the Consent Decree. Indeed, the population of the Jail (with one exception, September 12, 2002, when the population measured at 11:59 p.m. was 1105) did not exceed the 1,100 total cap set by the Consent Decree between November 2001 and August 2005 (the end point for the data in the record on this issue). (R.267 ¶ 32 & Ex. A.) This is true despite the fact that the Jail handled on average 50,000 bookings per year (and roughly 190,000 in total) during this forty-six month time period. (*Id.* ¶ 32.)

Likewise, the County has successfully used its best efforts to maintain the population of the BKOW within the 110 cap for the 11:59 p.m. count. Specifically, from November 2001 to August 2005, the

population of the BKOW was below 110 at the 11:59 p.m. count 93.4% of the time. (*Id.* ¶ 33 & Ex. C.)

Finally, it is uncontested that the County has successfully operated the Jail and the BKOW since June 2004 in such a way as to not violate the 30-Hour Rule. In fact, of the 118,571 prisoners booked into the Jail between June 2004 and October 2006 (the last data contained in the record on this issue), a mere forty-eight (or 0.04% of the total) were held in the BKOW for longer than twenty-four hours. More importantly, *none* was held in the BKOW for more than thirty hours. (*Id.* ¶ 36 & Ex. A; R.298 ¶ 4.)

STANDARD OF REVIEW

Questions about the interpretation and application of a statute are questions of law that this Court reviews independent of the lower courts. *See, e.g., Beard v. Lee Enters., Inc.*, 225 Wis. 2d 1, 9, 591 N.W.2d 156 (1999).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE CONTEMPT STATUTE PERMITS AN AWARD OF DAMAGES AS A REMEDIAL SANCTION FOR PAST VIOLATIONS OF THE 30-HOUR RULE.

A. Chapter 785 Does Not Permit An Award Of Damages As A Remedial Sanction For A Past Contempt.

1. Remedial Sanctions Cannot Be Imposed Unless The Contempt Is Continuing.

As enacted by the Wisconsin Legislature, Chapter 785 permits two separate types of sanctions for contemptuous behavior. A "'[p]unitive

sanction' means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court." Wis. Stat. § 785.01(2). A "'[r]emedial sanction' means a sanction imposed for the purpose of terminating a continuing contempt of court." Wis. Stat. § 785.01(3). Importantly, "[t]he remedies authorized by statute are the exclusive remedies available, and punitive sanctions may not be imposed in remedial sanction proceedings." *State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 341, 456 N.W.2d 867 (Ct. App. 1990).[8]

Accordingly, a trial court must determine if the contemnor's conduct is still continuing before imposing a remedial sanction in a contempt proceeding. If the conduct has ceased, there is no ongoing contempt to correct. *See King*, 82 Wis. 2d at 130; *Luebke*, 2003 WI App 207, ¶ 22; *see also Benn*, 230 Wis. 2d at 309 (describing remedial sanctions as being designed "to procure *present* and *future* compliance with court orders") (emphasis added); *Schroeder v. Schroeder*, 100 Wis. 2d 625, 637, 302 N.W.2d 475 (1981) (observing that "[c]ivil contempt looks to the present and future" and discussing "remedial" purpose of sanctions not in the sense of being purely compensatory but in the sense of being "coercive, *i.e.*, designed to force one party to accede to another's demand").

In keeping with this principle, the explanatory notes offered by the committee that drafted the current version of the contempt statute provide as follows:

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[8] As the Court of Appeals correctly observed, punitive sanctions are not at issue in this case. (App. 10.)

> Traditionally, a remedial sanction was the type of sanction imposed for civil contempt. *The purpose of the sanction was remedial in that it was designed to force a person into complying with an order of the court and terminating a present contempt of court.* That concept is continued here, even though without the civil contempt designation. *The definition makes it clear that a remedial sanction is appropriate only when the contempt is continuing, and cannot be imposed if for any reason the contempt has ceased, even as a result of the settlement of the case.*

Wis. Stat. Ann. § 785.01, Comments – L. 1979, c.257, § 11, at 412 (West 2001) (emphasis added).

As defined by the Legislature, remedial sanctions for contempt include "[p]ayment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court." Wis. Stat. § 785.04(1)(a). But, while remedial sanctions may include the payment of money, even for a past loss, this is only true when a continuing contempt exists and the contempt is purgeable. This is made clear not only by the definition of "remedial sanction" contained in § 785.01(3) as described above, but also by the catch-all provision of § 785.04(1)(e), which specifies that any other sanction imposed by a trial court, like those enumerated in subsections (a) through (d), must be directed at "terminat[ing] a continuing contempt of court." Thus, the Court of Appeals erred in construing the text of § 785.04(1) as indicating that the Legislature was authorizing the imposition of compensatory damages as a remedial sanction for a past contempt of court. (*See* App. 11.)

2. A Past Contempt Is Not Continuing Simply Because A Harm Caused By The Contempt Remains Uncompensated.

According to the Court of Appeals, the contempt statute provides remedies for contempt "which are aimed at ending the harm to the victim resulting from noncompliance with the order." (App. 10.) Traditionally, however, remedial contempt sanctions have been viewed as a means to force the contemnor to terminate a continuing course of conduct that constitutes contempt of a court order, not as a means to end a harm occasioned from past noncompliance with the order. *See, e.g.*, *Frisch*, 2007 WI 102, ¶ 35 (noting that "[a] remedial sanction . . . is civil and is 'imposed for the purpose of terminating a continuing contempt of court'") (emphasis omitted) (quoting Wis. Stat. § 785.01(3)); *King*, 82 Wis. 2d at 130 (contrasting civil contempt, which "looks to the present and future and the civil contemnor holds the key to his jail confinement by compliance with the order," with criminal contempt, where the "contemnor is brought to account for a completed past action"); *Diane K.J. v. James L.J.*, 196 Wis. 2d 964, 968, 539 N.W.2d 703 (Ct. App. 1995) (noting that "[r]emedial contempt is imposed to ensure compliance with court orders").

The three family law cases discussed at length by the Court of Appeals – *Griffin v. Reeve*, 141 Wis. 2d 699, 416 N.W.2d 612 (1987); *State ex rel. Larsen v. Larsen*, 165 Wis. 2d 679, 478 N.W.2d 18 (1992); and *Luebke*, 2003 WI App 207 – do not stray from this accepted interpretation of the contempt statute and the purposes underlying remedial contempt sanctions.

For instance, in *Griffin*, the Supreme Court considered a circumstance where the subject of a court order failed to make child support payments under the order. 141 Wis. 2d at 701-02. At the time of the contempt motion, the child support payments were still past due even though the child in question had reached the age eighteen. *Id.* at 701. According to the Court:

> While the court may not modify or terminate the support order after the child reaches majority, the force of the order does not expire until the parent complies. A parent's failure to pay child support after the child reaches majority is a continuing disobedience of a court order. The contempt is not past; it is ongoing.

Id. at 708.

As the Court of Appeals noted here, the *Griffin* Court also went on to observe generally that "[a] dominant purpose of the contempt proceeding is to aid the private litigant." *Id.* The aid to the litigant in *Griffin*, however, was not to compensate the aggrieved party for a past, completed harm, but was instead to provide "a mechanism to effect compliance with the court-ordered duty to support." *Id.*

In *Larsen*, the trial court found Gaylon Larsen in contempt for failing to make child support payments. 165 Wis. 2d at 681. As an alternative to serving jail time as a remedial sanction, the trial court granted Larsen the opportunity to purge the contempt by seeking work and obtaining psychiatric treatment. *Id.* Larsen challenged the treatment condition. *Id.* at 682-83. This Court responded to Larsen's arguments by observing that the treatment requirement was only a purge condition, exercisable at his will, rather than a remedial sanction. *Id.* at 683-85. A

given in the Court's discussion, however, was the fact that Larsen's underlying conduct – his failure to make child support payments – was, in fact, still ongoing. *Id.* at 681-82.

Likewise, in *Luebke*, the Court of Appeals considered a contempt finding against a guardian ad litem who had failed to comply with a court order directing her to place the proceeds from a minor settlement in trust until the minors in question reached the age of eighteen. 2003 WI App 207, ¶¶ 3-4. In considering the various sanctions imposed by the trial court, the Court of Appeals expressly noted that the guardian's contempt was still ongoing:

> Washington's allegedly contemptuous act or omission was her alleged failure to deposit, or see to the deposit of, the minors' settlement proceeds in restricted accounts as ordered by the court. So long as no properly restricted accounts containing the settlement proceeds existed, her alleged contempt continued.

Id. ¶ 22. Thus, while the Court of Appeals may have gone on to uphold monetary remedial sanctions, there was no question that the underlying contempt was still continuing at the time the sanctions were imposed. *Id.* ¶ 27. Significantly, nowhere in *Luebke* is any discussion of the idea that the sanctions were authorized solely for the purpose of compensating the children for any harms suffered as a result of the guardian's contemptuous conduct, regardless of whether the conduct was continuing.

3. *Frisch* Did Not Alter The Requirement That The Conduct Underlying The Contempt Be Continuing.

In *Frisch*, the trial court found Ronald Henrichs in contempt for failing to timely provide tax and income information to his former wife,

Heidi Frisch, pursuant to state statute, their divorce judgment, and a court order, and ordered him to pay the sum of $100,000 to Frisch as compensation. 2007 WI 102, ¶¶ 1, 2, & 23. The Court of Appeals reversed, concluding that the $100,000 award was improper because the contempt was no longer continuing at the time of the contempt hearing because it believed Henrichs had supplied the required information immediately prior to the hearing. *Id.* ¶¶ 3 & 26.

The Supreme Court reversed again, reinstating the compensatory award. *Id.* ¶ 4. According to the Court, Henrichs' contempt was continuing because his long-standing failure to timely provide the income information enabled him to avoid any modifications to his child support obligations. *Id.*

Contrary to the reasoning of the Court of Appeals in the case at bar, *Frisch* does not stand for the overly-broad proposition that all "unremedied injuries" suffered as a result of contempt constitute continuing contempt under § 785.01(3) regardless of whether the underlying contemptuous conduct is still ongoing. According to the Court in *Frisch*, the circuit court's support order required not just the production of the income information, but its timely production each year that child support was due. *Id.* ¶ 47. Otherwise, absent timely production of the income information, Henrichs was able effectively to avoid being subject to court-ordered modifications of his child support obligations. *Id.* Ultimately, by not providing the required information, the Court observed, Henrichs deprived Frisch of her ability to ever seek such modifications for the years in question. *Id.* ¶¶ 47 & 77. As a result, according to the Court, Frisch and

her children "lost their traditional remedy" and "cannot be made whole" because of Henrichs' contempt. Absent such a remedy, the Court concluded that the contempt remained continuing. *Id.* ¶¶ 47, 62, & 81.

As the Court noted, the circumstances in *Frisch* were "unusual" and were rooted in the unique interplay between Chapter 785 and the family law provisions of Chapter 767. *Id.* ¶¶ 40-49, 62, & 81-82. According to the Court, "[b]ecause Ronald could not and did not turn back time when he produced the required information too late to be acted on, his contempt was and is continuing *within the legislative directive of Wis. Stat. § 767.27(2m).*" *Id.* ¶ 81 (emphasis added).

However, the decision does not extend to all situations where a past contempt has allegedly caused a harm that might be remedied through other existing avenues of relief, whether constitutional, common law, or statutory. Such a reading of *Frisch* would remove the decision from its particular facts and family law context and result in a broad rule that *all* acts of contempt would be continuing for the purposes of § 785.01(3) – even if they had ceased before a contempt motion was ever brought – unless and until any alleged harm caused by the contempt was remedied by a damages award under § 785.04(1). Such a reading of *Frisch* would render the text of § 785.01(3) meaningless insofar as it limits remedial contempt to continuing acts of contempt.

B. Here, The Contempt Found By The Circuit Court Was And Is Not Continuing, Even Under *Frisch.*

It is undisputed that the problems with the County's implementation of the 30-Hour Rule were resolved months before plaintiffs ever filed their initial contempt motion, had not reoccurred by the time the Circuit Court issued its ruling on contempt, and have never again been an issue (more than four years later). In fact, although roughly 50,000 prisoners are booked into the Jail each year, no violations of the 30-Hour Rule have occurred since May 2004. (R.267 ¶ 36 & Ex. A; R.298 ¶ 4.) As a result, Chapter 785's plain language and the controlling authority discussed above all establish there was no continuing contempt at issue before the Circuit Court and no basis for the imposition of a remedial sanction such as compensatory damages.

This is true even under the holding of *Frisch*. Unlike the appellant in *Frisch*, plaintiffs are not in a position where the contempt has deprived them of any existing remedy under the law for any alleged harm, either as individuals or, should the law permit, as a class. As a result, in contrast to the contemnor's former spouse in *Frisch*, plaintiffs have not "lost their traditional remedy." As such, the holding of *Frisch* does not dictate the conclusion advanced by plaintiffs and adopted by the Court of Appeals.

II. *FRISCH* SHOULD NOT BE APPLIED RETROACTIVELY TO THIS CASE.

In Wisconsin, there are three factors a court considers in determining whether a new judicial holding should be applied retroactively. First, does the holding "establish a new principle of law, either by overruling clear past

precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed"? *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 109, 280 N.W.2d 757 (1979). Second, "[w]ill retroactive operation further or retard the operation of the judicial holding in question?" *Trinity Petroleum, Inc. v. Scott Oil Co.*, 2007 WI 88, ¶ 77, 302 Wis. 2d 299, 735 N.W.2d 1. Third, "[w]ill retroactive application produce substantial inequitable results? If these factors are met, the judicial holding in question should not be applied retroactively." *Id.* (footnote omitted).

Here, the Court of Appeals raised the issue of whether *Frisch* – which was decided eighteen months after the Circuit Court's January 2006 finding of contempt and more than three years after the violations of the 30-Hour Rule stopped – should be applied retroactively to this case *sua sponte*, deciding that it should because it was only a "further explanation of the scope of [the contempt statute], rather than announcement of new law." (App. 16 & n.6.) This was error.

First, given the plain language of §§ 785.01(3) and 785.04(1), and in light of prior precedent repeatedly referencing the need for contemptuous conduct to be continuing in order to justify remedial sanctions, *Frisch*'s holding was an extension of the law of contempt that was not forecast by prior precedent. None of the cases discussed above or in the Court of Appeals' decision imposed a remedial contempt sanction where the underlying conduct had ceased at the time of the trial court's contempt finding. Certainly no prior published decision expressly held, like *Frisch*,

that remedial contempt sanctions could be imposed where the underlying conduct had stopped but the victim of the contempt had lost all traditional recourse to recover for any losses suffered as a result thereof.

Second, the retroactive application of *Frisch* will not further the application of the new rule announced therein. As noted above, the purpose underlying all remedial contempt sanctions is to coerce present and future compliance with court orders. *Frisch*'s extension of the concept of what constitutes a "continuing contempt" will not further this purpose with respect to cases arising before its holding was announced, as the contemptuous conduct at issue in those cases will necessarily have already stopped in order for the ruling to even apply.

Third, retroactive application of *Frisch* will work substantial inequitable results. Plaintiffs did not request compensatory damages in their complaint, the plaintiff class was not certified for damages, and the negotiated Consent Decree purposefully omitted damages as a remedy for any violations thereof. (R.282 at 11-14; App. 22 & 32-33.) Nonetheless, the County is now faced with the inequitable result of a Court of Appeals decision directing the Circuit Court to impose potentially drastic financial sanctions on the taxpayers of Milwaukee County based solely on judicial authority decided three years after the fact and announcing a new rule of law.

In making this argument, the County does not suggest – as has been argued by plaintiffs – that it should be free to flaunt the requirements of the Consent Decree with impunity so long as it can stop before a court

intervenes. As is described above, the County has consistently worked to comply with the myriad provisions of the Consent Decree since its entry seven years ago. Also, the record does not suggest that the County purposefully evaded compliance with the Consent Decree, relenting only upon imminent threat of a monetary sanction. Ultimately, once it discovered the problem in its implementation of the 30-Hour Rule, the County on its own adopted restrictions with respect to the operation of the Jail that were stricter than those set forth in the Decree and which imposed a financial burden on the taxpayers of Milwaukee County. (R.262, Ex. K. at 148-49 & 155; R.267 ¶ 26.) Likewise, the County voluntarily agreed in May 2007 to make those restrictions permanent for the remainder of the life of the Decree's population provisions, to extend the period before which it could seek to terminate the Decree, and to comply with tighter reporting requirements under the Decree. (R.322.) In short, the County has not escaped the consequences of its past failure to comply with the 30-Hour Rule. It should not be held further responsible, however, under a rule of law first announced more than three years after it cured its failings under the 30-Hour Rule.

III. IF THE COURT OF APPEALS CORRECTLY APPLIED *FRISCH*, THE MAJORITY'S HOLDING IN *FRISCH* SHOULD BE REEXAMINED.

Under the doctrine of stare decisis, this Court has the authority only under limited circumstances to overrule its prior holdings. *Johnson Controls, Inc. v. Employers Ins.*, 2003 WI 108, ¶¶ 94-100, 264 Wis. 2d 60, 665 N.W.2d 257. However, as this Court has reasoned:

> Stare decisis is neither a straightjacket nor an immutable rule. We do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision.

Id. ¶ 100 (citation omitted). Thus, among the questions that must be considered in deciding whether to depart from a prior decision are "whether the prior decision is unsound in principle" and "whether it is unworkable in practice." *Id.* ¶¶ 99; *see also Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 93, 295 Wis. 2d 1, 719 N.W.2d 408.

If the Court of Appeals was correct in reading *Frisch* as holding that a contempt is necessarily continuing as long as "the victim(s) of the noncompliance have suffered unremedied injury as a direct result of that noncompliance" (*see* App. 19), then *Frisch* represents an unsound, unworkable departure from the law of contempt that must be reexamined by this Court. Again, under such an interpretation of remedial contempt powers, there would be no principled or workable way to distinguish contempt that has ceased from contempt that is continuing – rather, *all* contempt would be continuing absent compensation from the contemnor to the victim. This is not supported by the plain language of the statute itself, is not consistent with prior precedent focusing on the purposes behind remedial contempt remedies, and transforms remedial sanctions from a coercive tool designed to ensure present and future compliance with court orders into an all-purpose tort remedy for past contempt.

Justice Butler, joined by Justice Bradley, warned of exactly such a consequence in his concurrence in *Frisch*:

> I write separately because the majority opinion does violence to the law of remedial contempt when application of accepted principles of contempt law will do. In my view, the majority opinion distorts beyond recognition the meaning of "continuing contempt" under Wis. Stat. § 785.01(3) by holding that a failure to meet a deadline constitutes a "continuing contempt" of court.

2007 WI 102, ¶ 84 (Butler, J., concurring). Believing that the record demonstrated that Henrichs' contemptuous conduct in fact was continuing (through his ongoing efforts to shield his true income from the court and his former wife), Justice Butler suggested that the majority was "shoehorn[ing] the concept of 'continuing contempt' under Wis. Stat. § 785.01(3) to fit its view of the facts" and that its "definition of 'continuing' invents a new legal fiction to reach a desired outcome." *Id.* ¶¶ 100-01. As a result, Justice Butler warned, "another law, the law of unintended consequences, is likely to impact future cases involving contempt orders issued under § 785.01(3)." *Id.* ¶ 101.[9]

IV. IF THE COURT OF APPEALS CORRECTLY APPLIED *FRISCH*, IT NONETHELESS ERRED IN MANDATING THAT THE CIRCUIT COURT AWARD DAMAGES.

According to the Court of Appeals, the issue before it was only "whether financial sanctions *may* be imposed to purge the contempt found by the trial court in this case." (App. 9 (emphasis added).) Even the Circuit Court did not state that it had concluded that compensatory damages would

[9] In dissent, Chief Justice Abrahamson noted the disagreement on whether Henrichs' conduct was ongoing and reasoned that the Court should remand for the trial court to enter a specific finding on whether he continued to shirk his obligations to the court and his spouse. 2007 WI 102, ¶ 111 (Abrahamson, C.J., dissenting).

be necessary and appropriate *but for* the statutory limit on such damages in cases where the contempt is continuing. (R.282 at 8-9; App. 28-29.)

Given the limited issue presented on appeal, the Court of Appeals erred in directing – once it concluded that damages were an *available* sanction under § 785.04(1) – that the Circuit Court determine on remand the "sum of money sufficient to compensate" any prisoners held in the booking area of the Jail in excess of thirty hours. (App. 19.) The Court of Appeals erred in this respect because its directive eliminated any discretion on the part of the Circuit Court in determining the proper remedy, if any, among those available to it under § 785.04(1)(a)-(e).

Without question, the authority of a trial court to use its contempt power, including the decision of which remedial sanction, if any, to impose, is discretionary. *See, e.g., City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995); *N.A.*, 156 Wis. 2d at 341. This discretion is embodied in the plain language of the contempt statute itself, as § 785.04(1) spells out that a trial court "may impose one or more of the . . . [enumerated] remedial sanctions" or any another sanction designed by the trial court itself if those laid out in the statute would not be effective in terminating a continuing contempt of court. Even plaintiffs acknowledged this discretion and the other remedies available before the Circuit Court. (R.277 at 2 n. 2.) The Court of Appeals' ruling completely usurps this inherent discretion in directing that the Circuit Court impose a specific sanction upon remand.

This point is underscored by the fact that research reveals no other decision – in Wisconsin or elsewhere in the United States – that has actually required that compensatory damages be paid directly to a class of prisoners solely for past violations of a decree. Plaintiffs cited to no such cases in their briefs before the Court of Appeals, and the Court of Appeals offered no authority specific to this context, let alone a decision providing for an award of damages directly to a plaintiff class of prisoners based solely on past violations of a consent decree.[10] Indeed, while numerous decisions have directed that damages be paid to a plaintiff class of prisoners as part of the initial entry of a consent decree or as liquidated damages for future violations of a decree, and others have directed that the party violating a jail consent decree pay money into a fund for the improvement of conditions in the jail, research reveals none that has imposed the payment of compensatory damages directly to a class of prisoners as a

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[10] Plaintiffs cited to two cases in their initial brief before the Court of Appeals for the proposition that prisoners are entitled to compensation if they suffer harm as a result of a violation of a court order regarding the conditions of their confinement. (*See* Plaintiff-Appellants' Br. at 9.) However, *Hutto v. Finney*, 437 U.S. 678, 691 (1978), concerned only an award of fees to counsel for prison inmates based on a finding of bad faith on the part of officials in failing to correct unconstitutional prison conditions. Further, in *Carty v. Farrelly*, 957 F. Supp. 727, 747-48 (D.V.I. 1997), the court deferred a ruling on the issue of whether the defendants should pay monetary sanctions for violations of a prison consent decree and instead directed only that they pay the plaintiff prisoners' attorney's fees. As discussed below, the district court subsequently denied the request for monetary sanctions in *Carty v. Schneider*, 986 F. Supp. 933, 939-40 (D.V.I. 1997). Plaintiffs also cited to a number of other cases for the proposition that prisoners are entitled under certain circumstances to compensatory damages for having to endure unconstitutional conditions of confinement, but all but one of the referenced cases involved a claim or claims for damages directly under 42 U.S.C. § 1983 or on a mass tort theory. The sole exception, *Bohannon v. Hopper*, No. 98-0275-RV-S, 2000 U.S. Dist. LEXIS 5834, at *2-3 (S.D. Ala. April 17, 2000), involved a consent decree agreed upon by the parties that included the payment of damages to the plaintiff class. (*See* Plaintiff-Appellants' Br. at 16 n. 8.)

sanction for past, concluded violations of a consent decree absent a purge condition that would allow prison officials to avoid the sanction. *See, e.g.*, *Essex County Jail Inmates v. Amato*, 726 F. Supp. 539, 542-44 & 548-49 (D.N.J. 1989) (as part of consent decree, parties stipulated to per prisoner, per day fine for population violations to create bail fund for prisoners' benefit; court rejected request that separate stipulated fines for violations of decree regarding prisoner recreation be paid directly to prisoners); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1357 & 1359 (5th Cir. 1995) (fines imposed for future violations of consent decree population cap); *Palmigiano v. DiPrete*, 710 F. Supp. 875, 888-89 (D.R.I.), *aff'd*, 887 F.2d 258 (1st Cir. 1989) (imposing prospective fines if jail officials failed to show compliance with court order by future date); *Mobile County Jail Inmates v. Purvis*, 551 F. Supp. 92, 97-98 (S.D. Ala. 1982), *aff'd*, 703 F.2d 580 (11th Cir. 1983) (prospective daily fine imposed commencing on date of contempt hearing, but jail officials allowed to purge sanction by complying with court order); *see also Carty v. Schneider*, 986 F. Supp. at 939-40 (denying requested monetary sanction for ongoing failure to comply with prison consent decree, noting the interest of the state and local authorities in managing their own affairs and that monetary sanctions would drastically affect the public interest and would impede efforts to improve conditions of confinement within the prison system).

Here, under the decision of the Court of Appeals, the Circuit Court would have no discretion to consider whether a monetary sanction payable directly to the plaintiff class – as opposed to any other sanction, monetary

or otherwise – would be appropriate and necessary under the circumstances unique to this case. Instead, the taxpayers of Milwaukee County would necessarily bear the burden of funding a potentially drastic award of damages to the plaintiff class, inevitably to the detriment of ongoing efforts to fund and implement other improvements in the Jail and, more generally, to the already overburdened county finances as a whole.

In addition, in removing any discretion from the hands of the Circuit Court, the mandate of the Court of Appeals also looks past the multitude of procedural problems that would make an award of damages directly to the plaintiff class all but unworkable. Due process considerations inherent to the contempt procedure in Wisconsin demand that petitioners have notice and an opportunity for a hearing with respect to a remedial sanction imposed in favor of any single member of the plaintiff class in this case. *See* Wis. Stat. § 785.03(1). Moreover, class actions for injunctive relief are procedurally and substantively different than those for damages, and there has been no effort to date by plaintiffs to satisfy their significant burden to justify the certification of a class for damages. *See, e.g.*, Wis. Stat. § 803.08; Fed R. Civ. P. 23(a), (b)(1) & (2), & (c)(2)(A) (regarding classes for injunctive relief); Fed R. Civ. P. 23(a), (b)(3), & (c)(2)(B) (regarding classes for damages).

In fact, considerations usually central to the question of whether a plaintiff class can be certified for damages do not weigh in favor of such a class under the present circumstances. *See, e.g., Pastor v. State Farm Mut. Auto Ins. Co.*, 487 F.3d 1042, 1047 (7th Cir. 2007) (reasoning that "when a

separate evidentiary hearing is required for each class member's claim, the aggregate expense may, if each claim is very small, swamp the benefits of class-action treatment"); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (class action treatment appropriate only "when the judicial economy from consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury"); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1023 (11th Cir. 1996) (denying class certification given existence of numerous individual issues with respect to damages).

By looking past these issues, the decision of the Court of Appeals ignores the very real possibility that any award of damages to individual prisoners for violations of the 30-Hour Rule would require individual hearings or assessments on the issue of damages for more than 16,000 prisoners, a procedural morass that necessarily would weigh heavily in the Circuit Court's consideration of whether to award such damages.

Nonetheless, unless the Court of Appeals' decision is overturned, the taxpayers of Milwaukee County will bear this burden despite the fact that the class action complaint in this case sought injunctive rather than compensatory relief. Likewise, the taxpayers will bear this burden notwithstanding the fact that the Consent Decree itself – consistent with the representations of counsel for the plaintiff class – does not contemplate an award of damages in the event of a violation of its provisions. Indeed, some twelve years after the initial *pro se* complaint was filed in this case,

seven years after the Consent Decree was entered, and roughly five years after the Decree was first eligible to be terminated, the Court of Appeals' decision requires the parties to now embark on lengthy and undoubtedly costly litigation over money damages that were never before asked for or contemplated in this litigation and which, regardless of the outcome, will not serve to better the Jail or its operation.

This is precisely the type of litigation that Congress sought to eliminate on the federal level in enacting the federal PLRA. As one federal judge has noted,

> The thrust of the criticism which prompted the legislation was that the federal courts had overstepped their authority and were mollycoddling the prisoners in state and local jails. In short, the time had come to let the responsible entities, the municipal and state legislatures, take care of their own correctional facilities. After all, the cost of keeping up with the decrees are state and municipal obligations to be borne by state and municipal taxpayers, why shouldn't they be dictated by state and municipal legislative bodies responsible to their constituents.

Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996), *aff'd in part & rev'd in part on other grounds*, 172 F.3d 144 (2nd Cir. 1999).

For all of the reasons described herein, this Court likewise should resist the temptation to prolong the involvement of the Circuit Court in costly, resource consuming litigation that focuses solely on a problem that the County fixed, on its own, more than four years ago and perpetuates a judicial decree that, by its own terms, may otherwise be ripe for termination.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the Decision of the Court of Appeals should be reversed.

Dated this 11th day of June, 2008.

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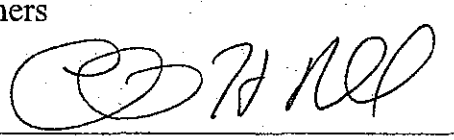
FORM AND LENGTH CERTIFICATION

I certify that this Brief of Petitioners conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (c), and (d) for a brief produced using a proportional serif font. The length of this brief is 10,610 words. This certification is made in reliance on the word count feature of the word processing system used to prepare the brief.

Dated this 11th day of June, 2008.

Attorneys for Defendants-Respondents-Petitioners

By: 

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CERTIFICATION OF APPENDIX

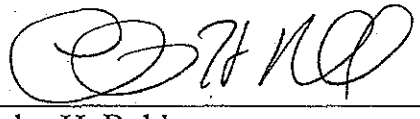
I hereby certify that filed with this Brief of Petitioners, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the decision and order of the Court of Appeals; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 11th day of June, 2008.

Attorneys for Defendants-Respondents-Petitioners

By: 

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CERTIFICATE OF SERVICE

I certify that I caused three (3) copies of this Brief of Petitioners to be served on the following on June 11, 2008 by U.S. Mail, first class postage prepaid:

Mr. Peter M. Koneazny
Legal Aid Society of Milwaukee, Inc.
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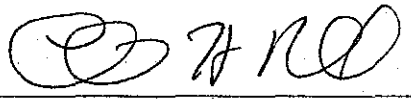
Milwaukee, WI 53233

Dated this 11th day of June, 2008.

Attorneys for Defendants-Respondents-Petitioners

By: 

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